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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

TYRONE C. WILLIAMS,

Petitioner

-vs-

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THE STATE OF OHIO,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

Reply

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition filed herein was lengthy, containing no less than six questions presented. For the most part, we stand on the Petition, and no response to Respondent's Reply Brief is deemed necessary. A few issues, however, merit brief response.

I. THE CONSTITUTIONAL VIOLATION IN THE ADMISSION OF THE TAPE RECORDED STATEMENT.

Respondent states, at p. 13 of his Reply Brief: "Appellant (sic) contends that once he has asked for counsel all questioning must cease until he has counsel. Appellant (sic) feels that there is a per se rule that calls for exclusion in a case like this." Respondent is correct in assessing Petitioner's position, and the Reply Brief was written and filed before the announcement of this Court's decision in Edwards v. Arizona, 49 U.S.L.W. 4496 (Decided May 18, 1981).

In that case, this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his

rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." Id., at 4498.

The foregoing excerpt from Edwards is precisely the rule which should have been applied below. The court below ruled that by further talking to police after asking for an attorney, Petitioner waived his right to counsel. There is no affirmative, expressed waiver on the record here, and the entire tape recording is available for review. Of course, waiver of the right to counsel will not be presumed from the silent record (on that point) present here, Carnley v. Cochran, 369 U.S. 506 (1962).

It must further be noted that, contrary to Respondent's assertions, the police conversation after Petitioner had exercised his rights by demanding counsel and questioning his ability to afford one was far more than a police conversation designed to truly ascertain whether Petitioner was serious in his desire to obtain counsel. The police used the old ploy of informing Petitioner that the two other suspects had given statements and suggesting that unless he spoke to the officers and gave his version, his version would never be known. Such tactics constitute exactly the sort of subtle interrogation condemned in Rhode Island v. Innis, 446 U.S. 291 (1980).

The decision below is thus also in conflict with Edwards v. Arizona, supra., as well as with Innis, Miranda, and practically every other self-incrimination case decided by this Court in the last fifteen years.

Respondent next insists that the admission of the tape recorded confession , even if erroneous, constituted harmless error, because Petitioner made oral statements to arresting officers before the tape recorded confession was secured in violation of his rights. It is true that the arresting officer testified that Petitioner made oral statements to the officer, and that the statements set forth by the officer (consuming but one page of the record) were basically the same as the version given on the tape, but the impact of the two were considerably different before the jury. It is one thing to hear a police officer read drily from his notes, and quite another to hear a tape recording approximately one-half hour in length, in the defendant's own words, recorded within 24 hours of the incident which he describes on the tape, emotionally discussing in much more detail the events which led to the fatal shooting. It must be noted further that in Ohio, even in the commission of a felony, a killing is not aggravated murder (the most serious degree) unless there exists at the time in the mind of the accused a purpose to kill.

Here, the oral statements to the officer indicated that the killing was accidental. While two other codefendants were present at the scene of the killing, neither testified. Petitioner's taped statement was the only eyewitness evidence presented to the jury. Since Petitioner alleged that the killing was accidental, his credibility was extremely crucial to the resolution of the issue raised by the defense of accident. The tape statement was played to the jury during the presentation of the prosecution's case in chief, and certainly had everything to do with the jury's evaluation of Petitioner's credibility. His oral statement to the officer presented the accident defense; his tape statement, obtained in violation of

his rights, materially assisted the jury in resolving hte credibility of his defense, and it resolved that credibility against Petitioner. Obviously, the admission of the tape recorded statement was prejudicial.

We note finally that the Court of Appeals below, though presented with the contention by Respondent that the confession on tape was harmless error because of the prior oral statements, did not even consider that argument, and certainly did not rule the error harmless beyond a reasonable doubt, as required by Chapman v. California, 386 U.S. 18 (1967). The State did not appeal, and cannot now raise the harmless error rule in this Court.

There is another aspect to the oral statements question presented by the State, and that is that the oral statements were given to police after the warrantless arrest of Petitioner in his home, in violation of Payton v. New York, 445 U.S. 573 (1980). Those statements should be ruled inadmissible under the doctrine set forth in Wong Sun v. United States, 371 U.S. 471 (1963), as we argue in our Petition. This being the case, the inadmissible oral statements cannot form the basis for a ruling that the admission of the inadmissible tape recorded statement was harmless error.

Respondent objects further that the Payton issue was not raised in the trial court or on appeal. Of course, Payton was decided two years after the trial herein, but, as stated in our petition, a motion to suppress was filed, Petitioner testified in the hearing on that motion that he demanded a warrant and asked the police to leave, and the Court below,

agreeing with our contention that O'Connor v. Ohio, 385 U.S. 92 (1966) required consideration of the issue on the merits, indeed ruled, albeit incorrectly, on the merits. There is thus no impediment to consideration of the issue by this Court.

Throughout Respondent's reply brief in opposition, it is claimed as to each error raised that the error was harmless, or that the claim was not properly preserved, or both. Except as to Question VI, the double jeopardy violation implicit in the consecutive sentences imposed on Petitioner for aggravated murder and aggravated robbery, all questions were raised and properly decided below. Respondent's harmless error claims were either not raised or denied by the Court below, which reached and decided the first five issues on their merits. Those claims by Respondent should get no more attention by this Court than they got below. The Petition ought to be granted and Petitioner's conviction reversed. The case should be remanded with instructions that will secure to Petitioner a fair trial, with only that evidence which was constitutionally obtained used against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this Response was served on opposing counsel on May 29, 1981, by leaving same at his office, 408 Court House, Cincinnati, Ohio 45202.

H. FRED HOEFLE, Attorney for Petitioner